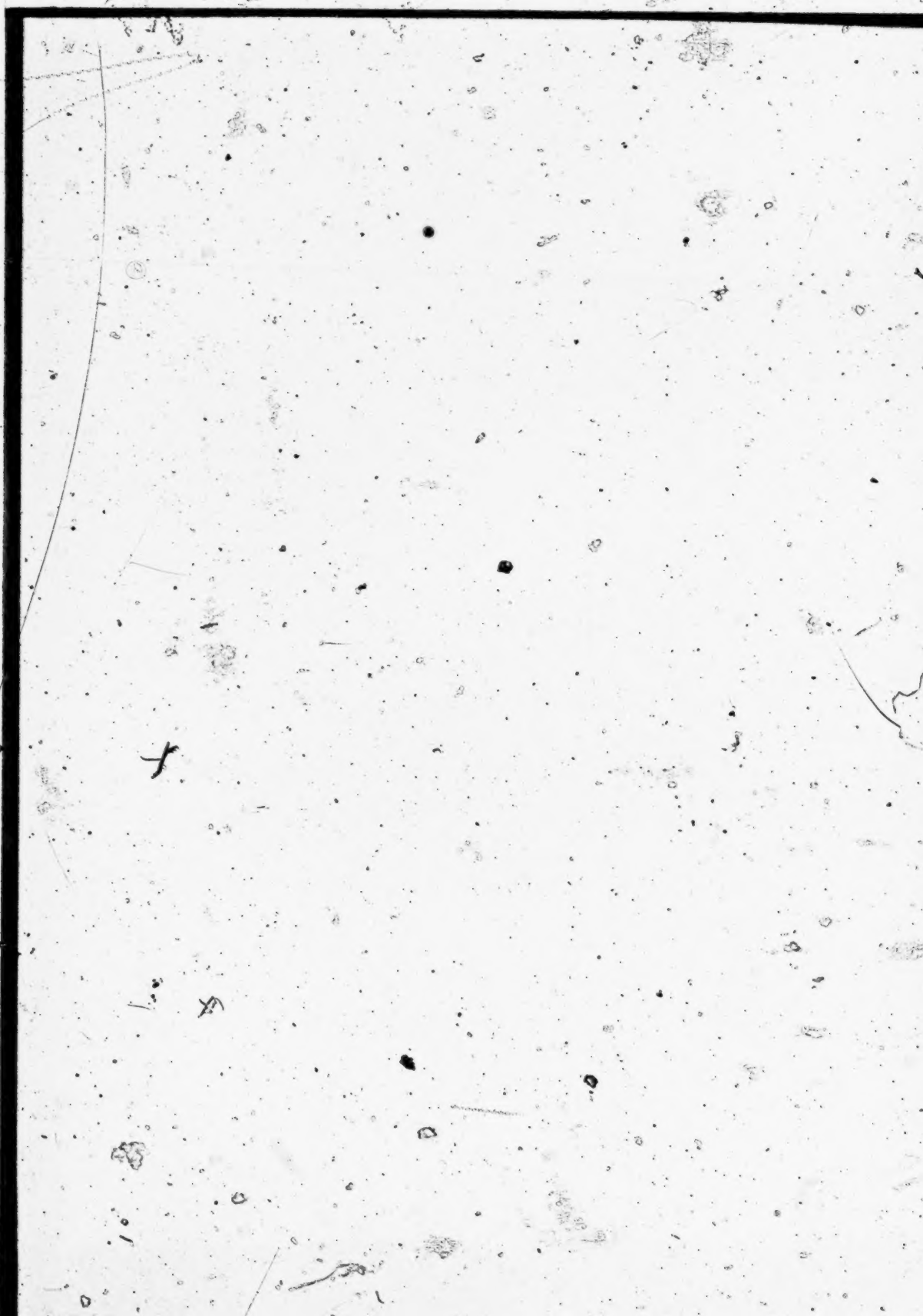

SUPREME COURT, U. S.

SEP 5 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 72

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Petitioners,

v.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

Respondent.

PETITIONERS' BRIEF

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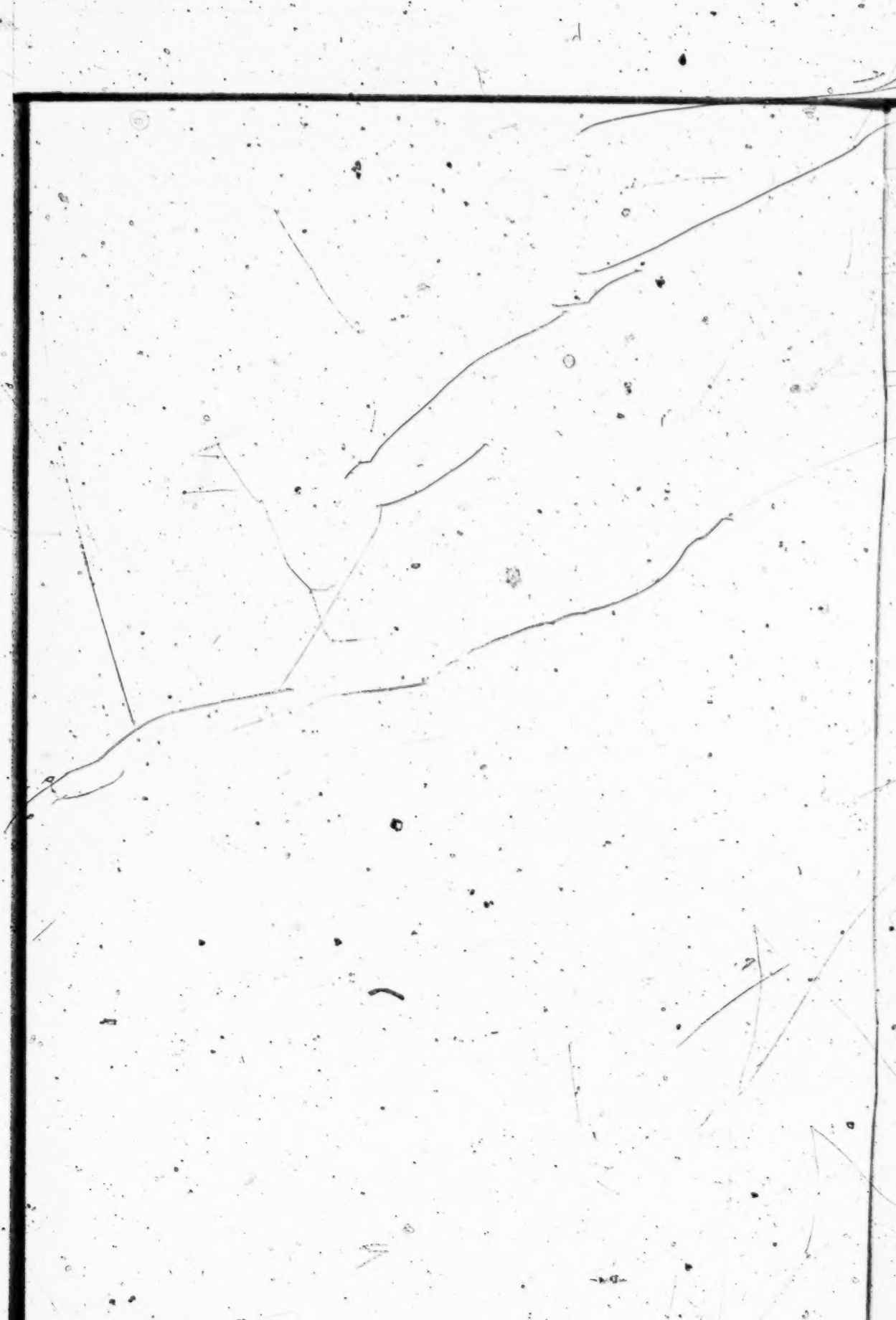

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IN THE

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No. 72

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Petitioners,

v.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

Respondent.

PETITIONERS' BRIEF

Petitioners are independent public accountants who have been indicted by a federal grand jury for mail fraud and conspiracy in connection with the financial statements of a client of their accounting firm, Lybrand, Ross Bros. & Montgomery.

Notwithstanding District Court findings (Judge Frederick van Pelt Bryan) that an injunction of limited duration against the taking of petitioners' depositions in a related civil case was necessary to protect petitioners' rights to a fair criminal trial, a majority of the Court of Appeals for the Second Circuit (Judge Wilfred Feinberg dissenting) dissolved the injunction in an opinion which is reported at 373 F. 2d 649 (178).* After the mandate

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* References in parentheses are to the Transcript of Record.

of the Court of Appeals was stayed by Mr. Justice Harlan of this Court (190), the District Court continued the injunction pending proceedings in this Court.

The carefully reasoned opinion of the District Court granting the original injunction is reported at 262 F. Supp. 264 (150).

The Question Presented

This petition presents the question whether a federal criminal court may act to insure a fair criminal trial by enjoining the taking of the depositions of the defendants in the criminal case in related private civil litigation pending in another federal district.

Constitutional Provisions, Statutes and Rules Involved

The constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States. Apart from the inherent power of a federal criminal court to preserve the integrity of a criminal trial, the statute giving the District Court power to issue the injunction is 28 U.S.C. §1651(a). The rules giving the District Court discretion to enter the injunction are Rules 2 and 57(b) of the Federal Rules of Criminal Procedure.

Statement of the Case

Petitioners Simon and Kaiser are partners and petitioner Fishman is a senior professional associate of the national independent accounting firm of Lybrand, Ross Bros. & Montgomery ("Lybrand"). All three have been

indicted in the United States District Court for the Southern District of New York upon charges of conspiracy to file false financial statements with the Securities and Exchange Commission and of mail fraud in connection with the financial statements of Continental Vending Machine Corp. ("Continental"), a client of the Lybrand firm. The Lybrand firm is not indicted but is named as a co-conspirator (85). The indictment was filed October 17, 1966, and the defendants have pleaded not guilty.

A. The Civil Action in the Eastern District of New York

Fifteen months before the indictment, Continental's trustee in reorganization under Chapter X of the Bankruptcy Act, respondent Wharton, brought a civil action against the Lybrand firm in the United States District Court for the Eastern District of New York, claiming damages for alleged negligence, fraud and conspiracy in connection with the same Continental financial statements alleged in the indictment as well as in connection with earlier ones. Petitioners are not named as defendants in the civil action (9).

In September 1965, respondent trustee began taking the oral deposition of petitioner Simon as a witness in the civil case. Simon testified for sixteen days and the transcript of his deposition is over 1800 pages. His deposition has been adjourned, but remains open for further direct examination (152). Before the indictment was filed, the trustee also took the depositions of several other Lybrand partners and associates (152) as well as extensive depositions of many other witnesses.

B. The Kaiser Deposition

In October 1966, just a few days before the indictment, counsel for Lybrand and counsel for the trustee agreed that the deposition of petitioner Kaiser would commence on October 20 (5). When the indictment was filed on October 17, counsel for Lybrand and Kaiser's personal counsel sought unsuccessfully an adjournment of the deposition so that the situation could be reconsidered in light of the indictment, and in particular so that Kaiser could retain and consult with counsel for the criminal case.

Unable to arrange an adjournment with counsel for the trustee, Kaiser's counsel was compelled to move on October 21, 1966 in the civil case for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure to prevent the deposition upon the ground that Kaiser's appearance at a deposition at that time would violate his right against self-incrimination and would be oppressive (6, 79). Kaiser was the sole moving party.

The motion was argued on October 21 on papers served in the early hours of that day.

Kaiser's motion was denied by Judge Jacob Mishler of the Eastern District on the ground that Kaiser was required to appear and assert his privilege against self-incrimination if he chose not to testify (79-83). As Judge Mishler said in denying the motion (80):

> "Kaiser's argument for a protective order is that compulsory appearance for examination is oppressive, and constitutes a violation of his Fifth Amendment right against self-incrimination."

Judge Mishler had ruled at oral argument that no other question was before him.

Judge Mishler's decision was filed October 24. It directed Kaiser to appear for examination on October 26 (82).

On October 25, Kaiser appealed to the Court of Appeals from Judge Mishler's decision and moved for a stay of the deposition pending appeal. The motion was argued October 26 and on that day the Court of Appeals denied the motion and dismissed the appeal, presumably on the ground that the order was not appealable, "without prejudice to anything which may transpire in the Court below" (6).

On the afternoon of October 26, Kaiser and his counsel appeared before Judge Mishler for the commencement of the deposition (5, R 4).* Kaiser's counsel moved for a week's adjournment of the deposition so that Kaiser could retain trial counsel for the criminal case and consult with him with respect to the deposition. The motion was denied from the bench and the deposition began (R 4-17).

Judge Mishler advised Kaiser of his rights against self-incrimination and asked Kaiser if he intended to waive those rights (R 19-22). Kaiser stated that he would not assert the privilege and answered the questions put to him. At the end of the day, the deposition was adjourned to October 31, when Kaiser again testified and when further deposition dates were fixed for November 2 and 4 (6).

C. The Motion for an Injunction in the Southern District of New York

On October 27, petitioner Kaiser, together with petitioners Simon and Fishman, retained counsel for the criminal case, who moved on November 1 in the Criminal Motion

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* "R" references are to unprinted parts of the Record in the Court of Appeals.

Part in the Southern District of New York on behalf of all three defendants for an injunction against respondent to prevent him from continuing the civil case against Lybrand until the completion of the criminal case on the grounds that the continued depositions would provide discovery to the Government which was not otherwise available to it and that the depositions would impede preparation for the defense of the criminal case (1-3).

On December 12, 1966, Judge Bryan granted the motion in part, holding that the taking of petitioners' depositions should be enjoined for ninety days, after which the injunction could be continued upon application by petitioners for good cause shown. 262 F. Supp. 64 (150). The injunction order was entered December 16, 1966 (173).

D. The Decision of the District Court.

The District Court found that both the indictment in the Southern District of New York and the complaint in the civil case pending in the Eastern District of New York charge fraud with respect to a number of the same transactions and that the subject matter of the indictment and of the civil complaint are, in the main, the same. The District Court found that the Assistant United States Attorney in charge of the criminal case had relied extensively in the presentation of the case to the Grand Jury upon materials yielded by discovery proceedings in the civil case, that he had been in personal contact with the attorneys for the trustee and that all deposition transcripts from the civil case had been made available to him (160, 84). The District Court noted that the prosecution would continue to make use of further depositions in the preparation and trial of the criminal case (160, 139).

Upon these findings, the District Court enjoined the civil depositions upon the ground that petitioners

> ". . . will suffer substantial and irreparable prejudice in their defense of the criminal charges against them if the Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings." (168)

The District Court found that the availability to the prosecution of extensive civil discovery would contravene the far more limited discovery provisions of the Criminal Rules:

> "The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Criminal Procedure." (162)

The District Court carefully weighed and considered the possible delay and inconvenience to the civil plaintiff of the temporary postponement of the depositions, and concluded that in balancing the probable prejudice to the defendants in the criminal case against reasonable delay in the taking of three depositions in a protracted civil case, the "scales are tipped overwhelmingly" in petitioners' favor (169).

In a decision which is unassailable in its logic and enlightened but coldly practical in its approach to the fair administration of criminal justice, the District Court observed:

> "If there is reasonable probability that either the prosecution or the defense will be able to secure a

> full disclosure of the other side's case while relying on the rules to prevent disclosure of its own, there is . . . unfairness likely to affect the result of the trial of such importance and significance as to require the intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it". (162)

The District Court reviewed the sharp distinctions between the broad discovery allowed in civil cases and the very limited discovery permitted in a criminal case. The Court analyzed previous decisions which have held that "where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter." (163) The Court observed that this principle applies equally whether the Government or the defense seeks a stay.

Recognizing the duty of the Federal District Courts to insure fairness in criminal trials, Judge Bryan concluded that the District Court has both the explicit and inherent power to grant an injunction to preserve petitioners' rights to a fair trial.

E. The Decision of the Court of Appeals and Continuance of the Injunction by the District Court

On appeal by respondent trustee, the Court of Appeals reversed the injunction on March 3, 1967, with Circuit Judge Feinberg dissenting (178-187). The judgment of the Court of Appeals was entered the same day (188).

In its opinion, the Court of Appeals majority (Lumbard, Chief Judge and Judge Smith) held that petitioners'

only remedy against depositions which would jeopardize their rights to a fair criminal trial was to assert the privilege against self-incrimination (183). Although not expressly deciding the question, the Court of Appeals assumed that the District Court had the power to enter the injunction (182).

Circuit Judge Feinberg, in his dissent, adopted the reasoning of the District Court, stating:

> "If the trial court by order allowed the Government full discovery in the criminal case and denied it to defendants, all would agree that this would be basically unfair. Yet that is what may well happen because of this reversal. The absence of collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect of the discovery on defendants in the criminal case is." (186)

After moving unsuccesfully in the Court of Appeals for a stay of mandate, petitioners applied to Mr. Justice Harlan for a stay of the mandate and for continuance by this Court of the District Court's injunction pending petition for certiorari to this Court. Mr. Justice Harlan, by order and memorandum opinion of March 13, 1967, stayed the Court of Appeals mandate but denied, without prejudice to prompt application in the District Court, petitioners' motion for continuance of the injunction. Thereafter, petitioners moved in the District Court for continuance of the injunction and that motion was granted on March 17, 1967 (189). The District Court found that the civil case was "by no means ready for trial" (192) and concluded that "if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the

criminal trial is likely to result as to require the continued intervention of the criminal court to insure the fair administration of criminal justice and the rules governing it." (194)

This Court granted certiorari on May 8, 1967, and the injunction remains in effect pending disposition of this petition. (195)

F. The Relevant Facts

The facts upon which the District Court based its decision to grant the injunction are simply stated and are not in dispute.

Both the indictment (85) and the civil complaint (9) concern the financial statements of Continental, a publicly-held company whose securities were listed on the American Stock Exchange (49-68). Continental was a client of the Lybrand firm and the petitioners' sole connection with the allegedly false financial statements was as independent public accountants (4, 68). The function with respect to which they stand accused, in both the criminal and civil cases, was to examine, in accordance with generally accepted auditing standards, and to express an opinion upon the financial statements of their client. As the District Court noted, this is the first time that a criminal prosecution has been brought against members of a leading accounting firm for alleged deficiencies in a professional engagement. (158).

The matters alleged in the civil complaint form the basis of the criminal charges. The principal charges in both cases relate to Lybrand's examination of Continental's 1962 financial statements (83, 158).

It is also undisputed that the deposition testimony so far given by petitioners Simon and Kaiser relates to the matters alleged in the indictment. Both were questioned and both testified with respect to factual matters as well as to their views of prevailing auditing standards and accounting principles (8, 84, 115).

As the District Court found, the prosecution has continuously received from the respondent's attorneys the deposition transcripts and documents produced in the civil action (84, 160). The prosecution asserted before the District Court its right to continue to do so (107-109).

As the District Court found (190-91), the civil case is complex. Both parties contemplate extensive discovery—in addition to the depositions of petitioners—before the case can be ready for trial (193).

The injunction issued by the District Court does not impair any substantive right of the trustee in the assertion of his civil claims for damages. All that is involved is mere delay and some inconvenience to the trustee in the preparation of his case, as opposed to insuring to petitioners a fair trial of a federal criminal case in which their professional careers are at stake.

Summary of Argument

A guide to discretion has evolved over the years in the Federal District Courts in cases involving concurrent civil and criminal prosecutions: civil discovery should not ordinarily go forward until the criminal case has been tried. The District Court here correctly held that because of the basic differences between the liberal discovery provisions of the Federal Rules of Civil Procedure and the restrictive discovery provisions of the Federal Rules of Criminal Procedure, it would be inherently unfair to restrict the defendants in a criminal case to the discovery available under the Criminal Rules while the prosecution avails itself of the broad array of discovery devices available under the Civil Rules.

The Court of Appeals held erroneously that petitioners' only remedy against unfairness in the criminal case was to plead the privilege against self-incrimination. It is not the office of the privilege against self-incrimination to harmonize the basic differences in the discovery provisions of the Civil and Criminal Rules.

The District Court clearly had the power to protect by injunction petitioners' rights to a fair trial. The injunction does not impair any substantive right involved in the civil case. Issuance of the injunction was a sound exercise of discretion, for mere delay and inconvenience in the pretrial preparation of a protracted civil case is a small price to pay for insuring the integrity of a federal criminal trial.

POINT I

Civil discovery should ordinarily be suspended pending the disposition of a related criminal case.

In granting the injunction, the District Court recognized a guide to discretion which has become well established in the Federal District Courts: civil discovery should not ordinarily go forward against a defendant in a criminal case when both cases involve the same issues.

In so holding, the District Courts have given appropriate recognition to the basic difference between the liberal discovery provisions of the Federal Rules of Civil Procedure and the restrictive discovery provisions of the Federal Rules of Criminal Procedure. Inherent unfairness arises if defendants in criminal cases are restricted to the discovery available under the Criminal Rules while the prosecution avails itself, directly or otherwise, of the broad array of discovery devices available under the Civil Rules.

Under the Civil Rules, litigants are permitted wide latitude in the pre-trial disclosure of all matters which relate even tangentially to the controversy. *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Depositions in civil cases are not subject to the restrictions which govern the examination of a witness at trial, so that a deposition witness is often obliged to answer all but the most clearly irrelevant or improper questions. Not only facts but opinions and conclusions are frequently elicited from a witness in a civil deposition.

Under the Criminal Rules, however, the Government cannot elicit from defendants, by interrogation under oath, their entire knowledge and even their opinions concerning all of the issues of the case. Similarly, a defendant in a

criminal case is limited in his pretrial preparation to examining his own prior statements and documentary evidence in the possession of the Government. Rule 16, FED. R. CRIM. PRO.

While the discovery available to defendants in criminal cases has been broadened by amendments to the Criminal Rules which became effective July 1, 1966, these newly liberalized discovery provisions do not by any means give to defendants the discovery tools available under the Civil Rules. As the District Court said:

> "It is unnecessary to dwell at any length on the wide differences between discovery in civil and criminal cases. The deposition and discovery process in civil litigation rests upon a broad footing of full mutual disclosure of information. On the other hand, the Rules of Criminal Procedure restrict disclosure to a minimum. . . . The contrasts between the policies and objectives of the civil and criminal procedure are particularly apparent in the provisions of the respective rules relating to depositions." (160-161).

Many district courts have recognized the unfairness inherent in the use by one side of discovery devices unavailable to the other. The district courts have thus frequently granted stays of civil discovery pending the conclusion of a related criminal matter, whether the discovery is sought by the Government or by the defense. Some of the district courts have based stays of civil discovery upon the ground that such discovery would be burdensome to the defendants. See, *e.g.*, *Perry* v. *McGuire*, 36 F.R.D. 272 (S.D. N. Y. 1964); *National Discount Corp.* v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952). In other cases, the district courts have granted such relief primarily upon the ground

that such discovery would violate the defendant's right against self-incrimination. See, *e.g.*, *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953).

National Discount Corp. v. *Holzbaugh*, *supra*, was an action based upon an alleged conspiracy to defraud in which the defendant moved to stay the taking of his deposition pending a criminal trial against him based on the same facts. The court granted the motion:

> "To require the defendant, Althouse, to submit himself to the plaintiff for further oral examination in this civil action, wherein, in the opinion of this Court, the fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceeding now pending against him, at a time when he is awaiting trial on the indictment filed in the criminal matter, would be oppressive and, at least, an indirect invasion of his constitutional rights." 13 F.R.D. at 237.

The Court of Appeals for the Fifth Circuit held in *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) that the district courts should prevent the abuse of discovery by a criminal defendant who seeks to obtain the Government's case by discovery in a related civil action. In that case, the Court made clear the differences between civil and criminal discovery and the need to harmonize the conflicting policies behind them:

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and crimi-

> nal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.
>
> " . . . Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. . . ." 307 F. 2d at 487.

See, also ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, vol. 2, p. 518 (1966); *United States* v. *Maine Lobstermen's Ass'n*, 22 F.R.D. 199 (D. Me. 1958); *United States* v. *Linen Supply Institute*, 18 F.R.D. 452 (S.D.N.Y. 1955).

A recent commentary, in pointing out the sharp differences between civil and criminal discovery, has noted that "[c]ivil procedure . . . has as its object the harnessing of the full creative potential of the adversary process, bringing each party to trial as aware of what he must meet as his finances and his lawyer's energy and intelliegnce permit. . . . Yet virtually no such machinery exists for the defendant accused of a crime. No deposition or admissions procedure is ordinarily available to him." Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180 (1960).

Broader and more comprehensive discovery in criminal cases may well be desirable as a matter of policy, but until that policy is reflected in the Criminal Rules, it is manifestly unfair to give to the Government in a criminal case all of the advantages of the Civil Rules at the same time that the defendant must prepare his case under the restrictions of the Criminal Rules. Accordingly, the District Court here

sought to prevent by injunction the unfairness which would result from the unequal application of two disparate schemes of pretrial discovery:

> "It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the government in advance of—and indeed here long in advance of—trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under such circumstances.
>
> "With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as appears probable in this case, there will already have been a thorough cross-examination of each of them by able and zealous counsel, a very material advantage to the prosecution in conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a close case." (164)

As previously noted, the problem is by no means novel (163). Many other district courts have concluded that civil discovery should be stayed unless compelling reasons dictate otherwise.*

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* *E.g., United States* v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964); *United States* v. *Bridges*, 86 F. Supp. 931 (N.D. Cal. 1949); *United States* v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947); *but see Hiss* v. *Chambers*, 8 F.R.D. 480 (D. Md. 1948), where a stay was denied because the deposition witness was not a party in the criminal case.

(Footnote continued on page 18)

The absence of any collusion between the prosecution and respondent in the taking of petitioners' depositions is not controlling. The District Court found here that although there was no evidence of such collusion (160), the important consideration is the effect upon the petitioners of the Government's use of the depositions after they are taken. As Circuit Judge Feinberg pointed out in his dissent in the Court of Appeals:

> "The absence of collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect of the discovery on defendants in the criminal case is." (186)

The record before the District Court established beyond dispute that deposition transcripts in the civil case had been made available to the prosecution and that the Government insisted upon its right to the continued assistance of the trustee (84, 108). The Government's use of the deposition transcripts in the preparation of its case creates a probability of unfairness—regardless of collusion. The District Court's injunction prevents even the suspicion of post-indictment collaboration in the depositions of peti-

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The decision of the District Court here was followed and an injunction issued by the District Court for the Western District of Pennsylvania in *United States* v. *American Radiator & Standard Sanitary Corp.*, 66 Crim. 295 (July 28, 1967) after a stay of the civil proceedings had been denied by the court in which the civil cases were pending, *Phila. Housing Authority* v. *American Radiator & Standard Sanitary Corp.* (E.D. Pa., Civ. No. 41773, June 7, 1967). These were antitrust cases, which may involve different considerations. Private treble damage suits may be viewed as a mode of antitrust enforcement and the antitrust laws themselves contemplate the use in civil suits of judgments obtained in Government litigation.

Stays of discovery in civil cases, on the ground of pending related criminal litigation, have been granted in a number of unreported decisions.

tioners and thus prevents even the possibility of conduct which could taint the trial. As Judge Bryan observed, ours is a system of law which "has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

The trustee argued below that petitioners could not identify with requisite specificity the harm they would suffer if their depositions were taken and their whole defense laid bare to the prosecution. But disadvantage and unfairness are inherent in unequal access to discovery. As the District Court observed, it is the impossibility of predicting precisely the turn of disadvantage which compels injunctive relief (165-67). This Court recently held in *Estes v. Texas*, 381 U.S. 532 (1965), that where the probability of prejudice is inherent in the circumstances, it is superfluous to seek identifiable prejudice in order to conclude that due process is wanting.

POINT II

The privilege against self-incrimination is not the sole measure of petitioners' rights against pre-trial disclosure of their case.

The Court of Appeals reversed the District Court's injunction upon the ground that petitioners could prevent pre-trial disclosure of their case only by pleading the privilege against self-incrimination (184). The Court of Appeals held that the defendants had a "remedy" in their Fifth Amendment privilege and that this was sufficient.

The opinion of the Court of Appeals majority is the first to suggest that while the Government may invoke the authority of the trial court to avoid disclosure of its case when

it brings concurrent civil and criminal suits, a person accused of a crime must yield discovery of his entire case to the prosecution except to the extent that he invokes his Fifth Amendment privilege against self-incrimination. The Court of Appeals thus rejected the substantial authority of decisions preventing discovery against the Government, which obviously has no Fifth Amendment privilege.

The Court of Appeals majority indicated complete misapprehension of the nature of a witness' Fifth Amendment rights when it suggested that petitioners could predicate refusal to testify in the civil case "on advice of counsel in order to prevent pretrial disclosure of their factual contentions" (184). The majority erred, for avoidance of pre-trial disclosure is not a legitimate Fifth Amendment ground for refusal to testify. The Fifth Amendment is concerned not with avoiding pre-trial disclosure, but only with testimony which may tend to incriminate. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *United States* v. *Costello*, 222 F.2d 656, 661 (2d Cir.), *cert. denied*, 350 U.S. 847 (1955).

The District Court correctly recognized that the Fifth Amendment privilege against self-incrimination is not the full measure of a defendant's right to a fair trial: "the rights on which defendants rely here are those governing the conduct of criminal proceedings with a view to assuring the fair administration of criminal justice to all parties. . . ." (165):

> "I see no reason why a defendant should be compelled to assert his Fifth Amendment privilege against self-incrimination against his will in order to protect other and different rights granted him by

rule, statute, constitution or even considerations of basic fairness." (166-167)

The remedy proffered by the Court of Appeals majority is not in the circumstances of this case any remedy at all, for petitioners might lose almost as much by refusal to testify on self-incrimination grounds as by conviction in the criminal case. We recognize that in law no stigma attaches to assertion of Fifth Amendment rights. Perhaps in the perfect society there would be no stigma of any kind. But we know as a matter of common sense that professional men associated with a distinguished firm of independent public accountants would end their careers by refusal to testify in order to avoid self-incrimination. See, Hook, COMMON SENSE AND THE FIFTH AMENDMENT (1957); *Ullmann* v. *United States*, 350 U.S. 422 (1956).

In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), this Court condemned coercion to testify by threatened loss of employment. *Garrity* requires a "free choice to speak out or to remain silent" (*Id.* at 497), a freedom which is undermined by the Court of Appeals majority here. The Court of Appeals majority would coerce petitioners to plead the privilege against self-incrimination, despite its impact upon their professional careers, or to yield an unfair advantage to the prosecution in the criminal case.

Fundamental as may be the Fifth Amendment's provision that no man shall be compelled to give testimony against himself, it is not the office of that historic provision to adjust and harmonize the different policies underlying pre-trial disclosure in civil and criminal litigation. The Fifth Amendment is not the full measure of a man's right to a criminal trial which is fundamentally fair and hardly comports with civilized standards of fairness to

say that since pre-trial disclosure to the prosecution of the entire defense case is a "natural by-product of another judicial proceeding" (183), a defendant's only remedy is his right against self-incrimination.

POINT III

The District Court has the jurisdiction and power to protect by injunction petitioners' rights to a fair trial. The granting of the injunction was a sound exercise of discretion.

The power of a federal criminal court to grant an injunction against civil discovery in the circumstances of this case is so clear that counsel for respondent conceded it in oral argument before the District Court (125). The Court of Appeals also assumed, without purporting to decide, that the District Court had power to issue the injunction (182), but later recognized the power by holding that the taking of depositions could be enjoined if they threatened "to interfere with the trial of the indictment." (186).

The District Court found three bases for its power to issue the injunction. The Court first noted its duty under the Federal Rules of Criminal Procedure to do all that may be necessary for the just determination of criminal cases:

> "The Federal Rules of Criminal Procedure, 'intended to provide for the just determination of every criminal proceeding,' must be construed by the courts 'to secure . . . fairness in administration.' Rule 2. And the courts are authorized, if no procedure is specifically prescribed by rule, to 'proceed in any lawful manner not inconsistent with these rules or with any applicable statute.' Rule 57(b). . . ." (156)

Second, power is conferred by the "All Writs" statute, 28 U.S. C. § 1651:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The All Writs Act has been invoked by the federal courts in a variety of circumstances in aid of their jurisdiction. See, *e.g., Steelman* v. *All Continental Corp.*, 301 U.S. 278 (1937) (injunction against prosecution of suit in another District Court); *Hanover* v. *Hegnes*, 269 Fed. 537 (8th Cir. 1920) (injunction against prosecution of stockholder litigation in state courts); *Bulloch* v. *United States*, 265 F. 2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959) (injunction against interference with civil rights). Recently, this Court held in *F. T. C.* v. *Dean Foods Co.*, 384 U.S. 597 (1966) that a Court of Appeals could enjoin corporate mergers even though no appeal was pending before the court and no Commission order had been entered from which an appeal could be taken.

There could be no more fitting application of the "All Writs" statute than to prevent by appropriate relief manifest unfairness which could taint the trial of a federal criminal case.

Third, the District Court held that it had the inherent power to issue an injunction to insure a fair criminal trial. Indeed, this Court has mandated such a duty to the federal courts. In *McNabb* v. *United States*, 318 U.S. 332 (1943), Mr. Justice Frankfurter stated:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of

> establishing and maintaining civilized standards of procedure and evidence . . .'' 318 U.S. at 340.
>
> ''The history of liberty has largely been the history of observance of procedural safeguards.'' *Id.* at 347.

The power and the duty of a criminal court to prevent unfairness was confirmed in *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), where this Court set aside a murder conviction because the trial court's failure to control the proceedings resulted in publicity which tainted the trial:

> ''The [trial] court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial . . .
>
> ''More specifically, . . . the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . . '' 384 U.S. at 357, 361. See also *Estes* v. *Texas,* 381 U.S. 532 (1965).

See *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91, 98 (8th Cir. 1956), *United States* v. *Parrott,* 248 F. Supp. 196 (D.D.C. 1965); *Labette County Commissioners* v. *Moulton,* 112 U.S. 217 (1884); *Ex Parte Lennon,* 166 U.S. 548 (1897); *United States* v. *Steffes,* 35 F.R.D. 24 (D. Mont. 1964); *City of Fresno* v. *Edmonston,* 131 F. Supp. 421 (S.D. Cal. 1955).

Since the power of the District Court to issue the injunction is clear, the only question which remains is whether the injunction was a proper exercise of District Court discretion. The availability of other forms of relief, such as applications for stays in the civil case, does not in any sense lessen the responsibility of the criminal court to insure that the criminal case will be tried fairly and without

undue advantage to the prosecution. Where, as here, the District Court determines that fundamental unfairness would result unless an injunction were granted, the District Court's discretion should not be disturbed. As Judge Feinberg said in his dissenting opinion in the Court of Appeals, "the issue is one of discretion" (186) and "I think the district judge was right, and, in any event, would allow him to exercise his discretion" (187).

The District Court exercised its discretion here to avoid the kind of fundamental unfairness envisioned by Chief Justice Taft in *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

CONCLUSION

The decision of the Court of Appeals should be reversed and the District Court should be given the discretion to continue the injunction pending the final disposition of the criminal case.

Respectfully submitted,

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